The Union's Role in a Formal Discussion

References:

Chapter 71 of Title 5, United States Code (U.S.C.), "The Federal Service Labor-Management Relations Statute"
Federal Labor Relations Authority Decisions
Federal Court Case Decisions

Purpose:

The purpose of this guide is provide Department of Defense components useful information that will assist them in determining what a "formal discussion" is, what the Union's role is in a formal discussion, and whether a "formal discussion" is taking place in order to avoid an Unfair Labor Practice (ULP).

Background:

5 U.S.C. 7114(a)(2)(A) provides that "an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment."

This union right to be present at a formal discussion can only occur when all four statutory elements in Section 7114(a)(2)(A) exist. These elements are: (1) a discussion must occur; (2) it must be "formal;" (3) the meeting must include one or more agency representatives and one or more bargaining unit employees; and (4) it must concern a grievance or personnel policy or practice or other general condition of employment. See Headquarters, Bureau of Government Financial Operations and the National Treasury Employees Union (NTEU) and NTEU, Chapter 202, 15 FLRA 423 (1984).

If all elements exist then the agency has an obligation to properly notify the Union, giving the Union an opportunity to attend any such meeting. Failure on the part of the agency do to so would be viewed by the Federal Labor Relations Authority (FLRA/Authority) as a ULP. The mere presence of a union official, who is otherwise at the meeting in his/her capacity as an employee, may not be sufficient representation to meet the Authority's interpretation of the statute. The Authority now holds that management must give the union prior notice of formal discussions so that the union could designate a representative of its own choosing. See Sacramento Air Logistics Center, McClellan Air Force Base and American Federation of Government Employees (AFGE), Local 1857, 29 FLRA 594 (1987). Notice of a planned formal discussion must provide at least a general indication of the subject matter of the meeting. See United

States Department of Transportation, Federal Aviation Administration and Professional Airways Systems Specialists, 19 FLRA 893 (1985).

The "opportunity to be represented at a formal discussion" means more than merely the right to be present. The right to be represented also means the right of the union representative to comment, speak and make statements. See U.S. Border Patrol and the American Federation of Government Employees, National Border Patrol Council (U.S. Border Patrol), 47 FLRA 170 (1993). On the other hand, this right does not entitle a union representative to take charge of, usurp, or disrupt the meeting. See Cumberland Army Depot and the American Federation of Government Employees, Local 2004, 38 FLRA 671 (1990). In addition, comments by a union representative must be governed by a rule of reasonableness, which requires the respect for orderly procedures. See U.S. Border Patrol, supra.

Elements of a Formal Discussion:

There are various factors the Authority considers in determining whether a meeting between a supervisor(s) and his/her (their) employees is a formal discussion. Such factors include (1) whether the individual who held the discussion was a first-level supervisor, or was higher in the management hierarchy; (2) whether any other management representative attended; (3) where the meeting took place; (4) how long the meeting lasted; (5) how the meeting was called (i.e., with formal advance written notice, or more spontaneously and informally); (6) whether a formal agenda was established for the meeting; (7) whether the employee's attendance was mandatory; and (8) the manner in which the meeting was conducted (i.e., whether the employee's identity and comments were noted and transcribed). See Social Security Administration and American Federation of Government Employees, Council of Social Security District Office Locals, 10 FLRA 115 (1982). These are the most common factors and, according to the Authority, are "merely illustrative."

Other factors may be identified and applied as needed on a case-by-case basis. For example, the Authority has found the "purpose of the discussion sufficient in itself to establish formality." See F.E. Warren Air Force Base and the American Federation of Government Employees, Local 2354, 52 FLRA 149 (1996) (Warren AFB). In Warren AFB, the purpose of the meeting was to discuss "the impending RIF." Another example provided in Warren AFB, was interviewing bargaining unit employees in preparation for third-party proceedings, such as Merit System Protection Board (MSPB) hearings. Of particular note in this decision, the Authority described a performance-counseling session as an example of a meeting that would not be a formal discussion. In trying to decide whether there is a "formal discussion" issue involved with your current agency situation, you will need to review how the Authority has ruled on previous situations regarding each of the four statutory elements.

A. Discussion:

The Authority has determined that the term "discussion" in the Statute is synonymous with "meeting," and no actual discussion or dialogue has to occur for the meeting to be considered a formal discussion within the meaning of Section

7114(a)(2)(A). See Veteran's Administration Medical Center, Brocton Division and National Association of Government Employees, Local R1-25, 37 FLRA 747 (1990). In this decision, the Authority reversed an Administrative Law Judge's ruling that since no discussion occurred at two meetings, each meeting was not a formal discussion. The Judge stated that, "All that was done at the meetings was the ministerial act of the employees selecting their shifts in the order of their seniority." However, the Authority found that the supervisor's distribution of new work schedules on paper, constituted "discussions." Since the supervisor held the meetings without giving the union the opportunity to be represented at those meetings, the agency committed an unfair labor practice. See also AFGE, Local 3828 and Department of Justice, Bureau of Prisons, Bastrop, Texas, 51 FLRA 1339 (1996).

B. Formal:

This particular element is sometimes the most difficult to determine. The agency should look to Authority decisions that address whether a meeting is formal or not formal. The following is an example of when a meeting was not formal. In Defense Logistics Agency, Defense Depot Tracy and Laborers International Union, Local 1276, 14 FLRA 475 (1984), the Authority examined the term "formal." It found that a meeting was called and conducted by a first-line supervisor on his own initiative, with no other management representatives present, was not scheduled in advance, lasted no more than 10 minutes, had no formal agenda, and concerned an Agency policy. The FLRA determined that this meeting was not a formal discussion within the meaning of Section 7114(a)(2)(A).

C. Agency Representatives:

Typically, this element is not difficult to determine, but there has been at least one precedent setting case in this area. This case, actually decided in the context of the employee's right to a representative during an investigation, concluded that investigators from the Investigator General's Office qualified as agency representatives. See NASA v. FLRA, 119 S. Ct. 1979 (1999). Another example of an agency representative is an agency attorney. See Luke Air Force Base and American Federation of Government Employees, Local 1547 (Luke AFB), 54 FLRA 716.

D. A grievance or personnel policy or practice or other general condition of employment:

The statutory definition of grievance is very broad and thus most employee complaints qualify as grievances. However, the Authority's position on this matter was successfully challenged in one United States Circuit Court of Appeals. The FLRA determined that investigation sessions to resolve **formal** EEO complaints are statutory formal discussions where an exclusive representative has the right to be represented and actively participate (on behalf of the bargaining unit and not necessarily as representative of the employee who filed the EEO complaint). See Luke AFB, supra. This decision was appealed to the United States Court of Appeals for the 9th Circuit and was overturned in Luke Air Force Base, Arizona v. Federal Labor Relations Authority, 208 F.3rd 221 (1999). This Circuit Court decided that EEO complaints are not grievances, since they have their own

statutory appeal process. For agency purposes, EEO complaints therefore do not amount to grievances **in the 9th Circuit Court of Appeals**. However, the most recent attempt by Air Force in challenging the FLRA's definition of grievance was not successful. In Department of Air Force, 436th Airlift Wing, Dover Air Force Base v. Federal Labor Relations Authority, Case No. 01-1373 (D.C. Circuit, January 17, 2003), the D.C. Circuit found that the Air Force had committed a ULP by not informing the Union of a mediation session dealing with a formal EEO complaint. Unless future litigation or legislative changes occur, the FLRA has consistently taken the position that EEO complaints are grievances and will find a ULP were the Union was not notified of meetings where all the other statutory elements were met. The 9th Circuit Court of Appeals continues to be the only exception.

Conclusion:

Management should anticipate when formal discussions may occur, provide notice to the union when these meetings are planned, and allow the union to send a representative of its choice to the meeting. Even if one of the employees present happens to be a union official, it cannot be presumed that the obligation is met until the union is notified and permitted to send a representative of its choice. Such notifications can be handled through the labor relation specialist or through the manager conducting the meeting. The Statute only requires union notification*;* whether the union sends a representative to attend is strictly up to it. Failure to send a representative to attend a formal discussion after receiving notification constitutes a waiver of the Union's right. See National Labor Relations Board and the National Labor Relations Board Professional Association, 46 FLRA 107 (1992).

It is not always clear whether a meeting will constitute a formal discussion. Even when a meeting does not concern a "personnel policy or practice" when it begins, it can develop or evolve into a discussion concerning a "personnel policy or practice" within the meaning of 5 U.S.C. 7114(a)(2)(A). See Laborers, International Union, Local 1276 v. DoD, DLA, Defense Depot, 37 FLRA 952 (1990). When there is doubt, managers should consult with a labor relation specialist. Ultimately, it is better to make the invitation than found guilty of a ULP.

If you have any questions concerning this reference guide, please contact the Field Advisory Services, Labor Relations Team, at (703) 696-6301, Team 3. Our DSN is 426-6301.